(1)

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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JAMES E. CONERLY - PETITIONER

VS.

MARVIN T. RUNYON, JR., POSTMASTER GENERAL OF THE UNITED STATES;UNITED STATES OF AMERICA; UNITED STATES POSTAL SERVICE; MICHAEL HOPPER; JOYCE ONG; ROBERT FUNGE - RESPONDENTS

ON PETITION FOR A WRIT

OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

JAMES E. CONERLY
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103 pp.

## QUESTION(S) PRESENTED

**(Refused Proof Of Evidence That Had Been Overlooked)**

#1. Did the United States Federal Court Of Appeals For The Ninth Circuit abuse its discretion by refusing Appellant's/ Petitioner's submission of documents of evidential information directly relating to the issue before the appellate court which was overlooked by the appellate court that also stated the information did not exist, and as a consequence dismissed Appellant's/Petitioner's suits?

**(Denied Equitable Tolling)**

#2. May the United states Federal District Court for the Eastern District and The United States Federal Circuit Court of Appeals for the Ninth Circuit Court deny Appellant/Petitioner the right to equitable tolling of his complaint where The Federal District Court

refused to appoint him legal representation, to assist in properly processing his suit against Individual Government Postal Officials and Government Postal Agency; especially where Appellant/ Petitioner had requested to the District court to appoint him legal representation during the originating of his legal filing in order to properly pursue his suit, and the court did not appoint legal representation until after two years into the case proceedings?

**(Refused The Doctrine "Exhaustion Of Administrative Procedure")**

#3. May the United States District Court for the Eastern District and the United States Court Of Appeals For The Ninth Circuit Court refuse to apply the doctrine of "Exhaustion of Administrative EEOC Procedure" prior to

filing legal complaint and equitable tolling after EEOC issues right to sue?

**(Found No Submitted Evidence Of Others Treated Differently)**

#4. May the United States Federal Court Of Appeals For The Ninth Circuit Court find that Appellant/Petitioner had not submitted any evidence that others outside of his protected class were treated more favorably when the court itself overlooked directly related and genuine material disputed factual evidence in the records, and the court later refused to acknowledge such information upon Appellant filing a request for rehearing and submission of exhibits by denying appellant's submission of exhibits as proof and his request for rehearing?

**(Denied Disputed Issues Of Facts To Be Tried By A Jury)**

#5. Did the United States Court Of Appeals For The Ninth Circuit Court abuse its discretion by refusing to have Appellant/ Petitioner the right to a "Jury Trial" where Appellant/Petitioner alleged Racial Discrimination, Religious Discrimination, Reprisal; Handicap Discrimination; On-going Discrimination; Harassment, and Conspiracy in which genuine disputed factual issues that are directly affect the decision exist?

**(Denied Any Jury Trial Prior To November, 1991)**

#6. May the United states Federal District Court for the Eastern District and the Federal Court Of Appeals For The Ninth Circuit Court find that Appellant/Petitioner had no right to jury trial before November, 1919 against the United States Federal Postal Service, including Title VII discrimination claims

involving termination, refusal to promotion, loss of pay, differential in compensation and benefits given to other races, and where there were genuine issues of disputed facts?

**(Refused Submission Of Newly Discovered Evidence)**

#7. May The United States Court Of appeals For The Ninth Circuit refuse Appellant's/Petitioner's "Newly Discovered Evidence" that was not capable of being produced prior to the appeal procedure?

**(Denied Right To Sue Government Individuals and Government Agency)**

#8. May the United States Federal District Court for the Eastern District and the United States Federal Court Of Appeals For The Ninth Circuit deny Appellant/Petitioner the right to sue United States Postal Government workers

individually, and the United States Postal Service Postmaster General Of The United States Postal Service Of The United States Of America, on grounds of: Race Discrimination; Religion Discrimination; Reprisal; Handicap Discrimination; On-Going Discrimination; Harassment, and Conspiracy?

**(Denied Right To Immediate And Unconditional Restoration)**

#9. Did the United States Postal Service deprive Appellant/Petitioner of his right to return to his prior government job position and benefits after his recovery from employment related injuries that accounted for less than a one year absence and his approved Workers' Compensation Claim?

**(Violated Constitutional Rights Under The 7th and 14th Amendment)**

#10. Did the Federal Courts violate

Plaintiff's/Appellant's/Petitioner's "Constitutional Rights" under the Seventh and Fourteenth amendment by the preceding acts numbers 1 through 9 alleged in this petition?

**LIST OF PARTIES**

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NO._____

_____

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1998**

**PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully pray that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is unpublished.

## JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was August 27, 1997.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: November 13, 1997, and a copy of the order denying rehearing appears at Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Amendment VII**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury

shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

**Amendment XIV**

All Persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person jurisdiction the equal protection of the laws.

**5 USC Section 702 (Administrative Procedure Act)**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and

their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations or judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief of any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

**Title VII Civil Rights Act Of 1964**

(See 42 USC Section 2000e)

**28 USC Section 1254 Court of appeals; certiorari: certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment of decree:

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up to decision of the entire matter in controversy.

**29 USC Section 701 et seq. (Rehabilitation Act )**

(see appendix W)

**29 USC Section 791**

(see appendix X)

**42 USC Section 1981**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make

and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties taxes, licenses, and exactions of every kind, and to not other.

**42 USC Section 1985 Conspiracy to interfere with civil rights**

(1) Preventing officer from performing duties. It two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or

to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States;

or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

**42 USC 2000e et seq. (Title VII)**

(SEE PERTINENT SECTIONS BELOW)

**42 USC 2000e-5 (g) Enforcement provisions**

Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two ears prior to the filing of

a charge with Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce he back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspend, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation on account of race, color, religion, sex, or national origin or in violation of section 704(a)[42 USC Section 2000e-3(a)].

**42 USC Section 2000e-16 Employment by Federal Government**

(c) Civil action by employee or applicant for employment for redress of grievance; time for bringing of action; head of department, agency or unit as defendant.

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one

hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency or unit, as appropriate, shall be the defendant.

**5 CFR Section 353.301 Military returnees and injured employees who recover within 1 year.**

(b) An individual who fully recovers from a compensable injury within 1 year of the date compensation begins, or from the time compensable disability recurs if the recurrence begins after the employee resumes regular employment with the United States. Such an individual must be restored immediately and unconditionally.

**29 CFR Section 1613.281 Statutory right.**

An employee or applicant is authorized by section 717(c) of the Civil Rights Act, as amended. 84 stat. 112, to file a civil action in an appropriate United States district court:

(a) Within thirty (30) calendar days of receipt of notice of final action taken by the agency on a complaint.

(b) After one hundred and eighty (180) calendar days from the date of

filing a complaint with the agency if there has been no decision.

(c) Within thirty (30) calendar days after receipt of final action taken by the Commission on the complaint, or

(d) After one hundred and eighty (180) calendar days from the date of filing an appeal with the Commission, if there has been no Commission decision.

For the purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a determination to award attorneys fees is made the decision will not be final until the procedure is followed for determining the amount of the award as set forth in Section 1613.271(c).

**29 CFR Section 1613.282 Notice of right.**

An agency shall notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing, in an final action on a complaint under Sections 1613.215, 1613.217, 1613.220 or Section 1613.221. The Commission shall notify an employee or applicant of his right to file a civil action and of the 30-day time limit for filing, in any decision under Section 1613.234

**Federal Rules Of Civil Procedure 60**

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment

order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or other wise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

**Federal Rules Of Appellate Procedure 40**

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

**STATEMENT OF THE CASE**

Employee/Plaintiff/Appellant/Petitioner

(hereinafter referred to as Petitioner)

filed his "Formal EEOC Complaint" on

June 21, 1989 on grounds of Postal Service Employment Discrimination in the areas of: (1) Race (2) Union Steward (3) Handicap (4) Reprisal after Agency failed to **mandatory** and **unconditionally** restore, as provided for in 5CFR Section 353.301, Amendment XIV of the United States Constitution "equal protection of the law" and "due process of the law" clauses, Petitioner to his previous job and his rights upon recovery from job related injuries. Whereby, Postal Agency's officials did not immediately nor unconditionally restore Petitioner, but they delayed reinstating him, required the conditions that Petitioner complete a new application for employment, undergo drug testing,

physical testing, hearing testing, sight testing, he be placed on a different tour (graveyard tour.

On May 15, 1990 EEOC issued its decision and a right to sue letter as provided do under 29 CFR SECTION 1613.281 and 282. Petitioner filed his Civil Action on May 30, 1990 (15 days after the decision and right to sue letter) under Title VII Of The Civil Rights Act Of 1964, 42 U.S.C. Section 2000e, and the Rehabilitation Act, 29 U.S.C. Section 791. Within Petitioner's complaint was a request for the District Court to appoint attorney representation under 28 U.S.C. Section 1915 due to proof of indigence.

On March 9, 1992, District Court granted Petitioner's motion for appointment of counsel.

On November 24, 1992, after appointment of counsel, District Court granted Petitioner's motion to amend his complaint to sue for violation and damages under Title IV of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. Section 1981, 1985(d), and 29 U.S.C. Section 791.

On February 1, 1993, District Court ordered Petitioner's cases 2:90-cv-1106 be consolidated with Petitioner's cases 2:92-cv-1613.

On March 1, 1994, District Court granted Defendants' motion to dismiss any claims against the United States Arising Under 42 U.S.C. Section 1981 or 1985, and further granted Defendants' motion for Summary Judgment as to Plaintiff's (herein Petitioner's) 42 U.S.C. Section 1981 and

1985 claims against the individual Defendants.

On June 1, 1994, District Court determined and ordered that there are no genuine issues of material facts and that Defendant is entitled to judgment as a matter of law. Further, District Court granted Defendant's motion for Summary Judgment on Plaintiff (herein Petitioner) Conerly's claims arising under Title VII Of The Civil Rights Act, 42 U.S.C. 2000e-16.

Plaintiff (herein Petitioner) filed his Notice Of Appeal For The Ninth Circuit Court on June 17, 1994.

On August 22, 1995 The United States Court Of appeals For The Ninth Circuit dismissed Plaintiff's (herein Petitioner's) Appeal for lack of

jurisdiction because the District Court had not ruled on Plaintiff's (herein Petitioner's) disability claim.

On May 21, 1996 District Court granted Defendant's motion for Summary Judgment on Plaintiff's Rehabilitation Act Claim, basing its decision on facts within the records of June 1, 1994 District Court's decision.

On May 28, 1996 Appellant (herein Petitioner) filed his Notice Of Appeal For The United States Court Of Appeals For The Ninth Circuit.

On August 27, 1997, The United States Court Of appeals For The Ninth Circuit filed and entered, filed, an order that the judgment of the District Court be affirmed.

On September 15, 1997, Appellant (herein Petitioner) filed his "Petition For Rehearing" and "Petitioner's Motion To File Exhibits" in the United States Court Of Appeal For The Ninth Circuit.

On November 13, 1997, The United States Court Of Appeals For The Ninth Circuit denied Appellant's (herein Petitioner's) motion to file exhibits and his petition for rehearing.

Petitioner comes now to make this Petition For Certiorari.

**REASON FOR GRANTING THE PETITION**

1. The Appellate Court overlooked crucial evidence in the records and after by means of overlooking and refusing submission of Appellant's/Petitioner's evidence submitted in Appellant's/ Petitioner's Request for Rehearing and

Motion To File Exhibits, the Appellate Court was able to decide in favor of the Defendants/Respondents. In the case of Anderson, et. al. v. Liberty Lobby, Inc., et al., 477 U.S. 243 (1985), the U.S. Supreme Court held "the Court of Appeals held that the requirement the actual malice be proved by clear and convincing evidence need not be considered at the summary judgment stage, and the with respect to those statements summary judgment had been improperly granted because a jury could reasonably have concluded that the allegations were defamatory, false, and made with actual malice." In the case at hand, the information that the District Court and the Appellate Court stated did not exist, did in fact exist within the records, and was "genuine" of such evidence that a

reasonable jury could return a verdict in favor of Plaintiff/Appellant/Petitioner. Whereby, Plaintiff/Appellant/ Petitioner stated, in the records, information that was admitted to by the Defendants/ Appellees/Respondents, that the agency choose to move Plaintiff/Appellant/ Petitioner rather than another individual of a different race, and that there were three other white race individuals that had been restored to duty with different treatment than he. The Appellate Court's decisions were directly opposed to Federal Rule 60 of Civil Procedures, because in light of this rule, the District Court's Decision should have been reversed and remanded. The Appellate Court failed and refused Plaintiff's rights under Federal Rule of

Appellate Procedure 40.

2. Both the District Court and the Court of Appeals failed and refused comply with the lawful equitable tolling provided under 29 CFR Section 1613.281 and Section 1613.282, which barred Plaintiff/ Appellant/Petitioner from filing a suit in court until exhaustion of his Administrative remedy and after a right to sue letter is issued. In the case of McKart v. United States 395 U.S. 185, 89 S Ct. 1657, the U.S. Supreme Court held that the agency should be given the first chance to exercise that discretion or to apply that expertise." In Gibson v. Berryhill, 411 U.S. 564, 93 S Ct. 1689, the U.S. Supreme Court stated that "A party must exhaust his available administrative remedies before invoking the equitable jurisdiction of a court."

This is exactly what Plaintiff/ Appellant/Petitioner did in the case at hand. Therefore, he had rights under USC Section 1981 as well as Title VII that the District and Appellate Court failed to acknowledge.

3. Notwithstanding the case of Barbara Landgraf v. USI Film Products, et al., 511 U.S. 244 (1994) decision in 1991, Plaintiff/Appellant/Petitioner had a right to jury trial for the following reasons:

(a) His case involved on-going acts, conspiracy, and violations of his civil rights by Federal Government Officials interfering with his pursuit of legal justice.

(b) In the Landgraf case, the Supreme

Court provided for a "jury trial" where the "complaining party seeks compensatory or punitive damages under the 1991 Act of Civil Rights." In the case at hand, not only was the complaining party's case still in District Court during the Landgraf decision, but it also involved on-going acts, conspiracy, and interference with his pursuit of legal redress.

(c) Plaintiff/Appellant/Petitioner was entitled to relief under 42 USC Section 2000e-5, 42 USC Section 1981, 42 USC Section 1985, and 29 USC Section 701 et seq.

4. All of the Individual Defendants/ Appellees/Respondents, the agency

Defendant/Appellee/Respondent, the District Court, and the Appellate Court clearly violated Plaintiff's/Appellant's/ Petitioner's Constitutional rights under the VII and XIV Amendments by depriving him of "due process" and "equal protection" rights that were guaranteed under the United States Constitution. In the case of Celotex Corp. v. Catrett, Administratrix Of The Estate Of Catrett 477 U.S. 323 (1986), the court held "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes

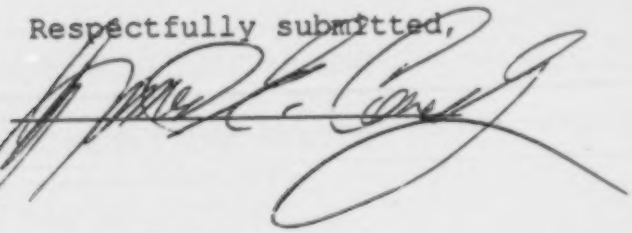
demonstrate the absence of a genuine issue of material fact." In the case at hand, the party seeking summary judgment purposely swayed the district court to overlook evidence of mentioned white race individuals, the district court purposely erred in granting the summary judgment in favor of the moving party, and the appellate court purposely erred in overlooking the record's evidence that was directly related and upholding the wrong doings of the lower district court.

**CONCLUSION**

For the reasons set forth above and herein, a writ of certiorari should issue to revise the judgment, orders, and decisions of the Court Of Appeals in this matter.

DATED: May 29, 1998

Respectfully submitted,



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JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-16092
CT/AG#: CV-90-01106-WBS/JFM

JAMES EARL CONERLY

Plaintiff - Appellant

v.

MARVIN T. RUNYON, JR., Postmaster General of the United States; United States Of AMERICA; UNITED STATES POSTAL SERVICE; MICHAEL HOPPER; JOYCE ONG; ROBERT FUNGE

Defendants - Appellees

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and

was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered - 8/27/97.

**FILED**
NOV 13 1997
CATHY A. CATTERSON,
CLERK U.S. COURT OF
APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| JAMES EARL CONERLY, | ) | No.96-16092 |
| | ) | |
| Plaintiff-Appellant, | ) | D.C. No. |
| | ) | CV-90-01106 |
| v. | ) | -WBS |
| | ) | Eastern |
| MARVIN T. RUNYON, JR., | ) | California |
| Postmaster General of the | ) | (Sacramento) |
| United States; United | ) | |
| States; UNITED STATES OF | ) | ORDER |
| AMERICA; UNITED STATES | ) | |
| POSTAL SERVICE; MICHAEL | ) | |
| HOPPER; JOYCE ONG; ROBERT | ) | |
| FUNGE, | ) | |
| | ) | |
| Defendants-Appellees. | ) | |
| | ) | |

Before: SCHROEDER, FERNANDEZ, and RYMER, Circuit Judges.

Appellant's motion to file exhibits is denied as unnecessary.

The petition for rehearing is denied.

**APPENDIX B**

FILED
SEP - 5 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| JAMES EARL CONERLY, | ) | No.96-16092 |
| | ) | |
| Plaintiff-Appellant, | ) | D.C.# CV- |
| | ) | 90-01106- |
| v. | ) | WBS |
| | ) | Eastern |
| ANTHONY M. FRANKS, | ) | California |
| Postmaster General of the | ) | (Sacramento) |
| United States, | ) | |
| | ) | ORDER |
| Defendant-Appellee. | ) | |
| | ) | |

Appellant is reminded that a copy of all submissions to this court must be provided to opposing counsel; all submissions must include statement that appellant has done so. Fed. R. App. P. 25(b), (d).

A copy of the motion shall be provided to appellee along with this order.

Appellant's motion to waive the technical requirements of 9th Cir. R. 30-1 is granted. The documents appended to the opening brief shall serve as the excerpts. The opening brief and excerpts of record previously received shall be filed.

For the Court:
CATHY A. CATTERSON
Clerk of the Court

**APPENDIX C**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

James Earl Conerly

v. CASE NUMBER: CIV S-90-1106 WBS JFM

United States of America

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 06/01/94 and 05/21/96.**

Jack L. Wagner,
lerk of the Court

ENTERED: Mary 21, 1996

by:_____
D. Bugay, Deputy Clerk

**APPENDIX D**

IT IS THEREFORE ORDERED that defendant's motion for summary judgment on plaintiff's Rehabilitation Act claim be, and the same hereby is, GRANTED. The Clerk is instructed to enter judgment forthwith in favor of the defendant on this court's Order of June 1, 1994 and the present Order.

DATED: May 16, 1996

WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

**APPENDIX E**

FILED
AUG 22 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FILED
AUG 24 1995
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| JAMES EARL CONERLY, | ) | No.94-16095 |
| | ) | |
| Plaintiff-Appellant, | ) | D.C. No.CV- |
| | ) | 90-01106- v. |
| | ) | WBS/J |
| | ) | |
| ANTHONY M. FRANKS, Postmaster General of the United States, | ) | **MEMORANDUM*** |
| | ) | |
| | ) | |
| Defendant-Appellee. | ) | |
| | ) | |

Appeal from the United States District Court for the Eastern District of California
William B. Shubb, District Judge, Presiding

Submitted August 16, 1995**

Before: ALARCON, FERNANDEZ, and RYMER, Circuit Judges.

APPENDIX F

James Earl Conerly, and employee of the United States Postal Service, appeals pro se the district court's summary judgment in favor of the Postmaster in Conerly's action alleging discrimination on the basis of his race and disability. This appeal is dismissed for lack of jurisdiction because the district court's order was not a final, appealable judgment. See 28 U.S.C. Section 1291; Chacon v. Babcock, 640 F. 2d 221, 222 (9th Cir. 1981). Absent certification under Fed. R. Civ. P. 54(b), the dispositions as to Conerly's Title Vii claims and civil rights claims do not

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R.34-4.

constitute a final, appealable judgment because Conerly's fifth cause of action, alleging discrimination on the basis of his disability, remains pending in the district court. See Chacon, 640 F. 2d at 222. accordingly, this appeal is dismissed for lack of jurisdiction.

**DISMISSED.**

FILED
DEC - 9 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| JAMES EARL CONERLY, | ) | No.94-16095 |
| | ) | |
| Plaintiff-Appellant, | ) | D.C. No.CV- |
| | ) | 90-01106- v. |
| | ) | WBS |
| | ) | Eastern |
| ANTHONY M. FRANKS, | ) | California |
| Postmaster General of the | ) | |
| United States, | ) | |
| | ) | ORDER |
| Defendant-Appellee. | ) | |
| | ) | |

Before: HALL and TROTT, Circuit Judge

Appellant's motion for production of transcripts at government expense is denied.

mocal/12/12.6.94/km/11

**APPENDIX G**

FILED
OCT 11 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| JAMES EARL CONERLY, | ) | No.94-16095 |
| | ) | |
| Plaintiff-Appellant, | ) | D.C. No.CV- |
| | ) | 90-01106- |
| | ) | WBS |
| | ) | (Sacramento) |
| ANTHONY M. FRANKS, Postmaster General of the United States, | ) | |
| | ) | ORDER |
| Defendant-Appellee. | ) | |

The court is in receipt of appellant's motion for leave to waive the excerpts of record requirement. The motion is granted. The opening brief previously received is ordered filed.

The previously established briefing schedule shall continue to govern.

Court records indicate that the district court has not issued the

**APPENDIX H**

certificate of record. If appellant has not already done so, he shall complete the enclosed transcript designation and ordering form and file it with the district court. Appellant is reminded that payment arrangements would have to be made with the court reporter(s) for transcription of any hearing that is designated. Appellant is further reminded that if he does not wish to designate transcripts, he still must provide an indication on the form of his intent not to do so.

Failure to file the transcript designation form with the district court will delay issuance of the certificate of record by the district court; absence of the certificate will block resolution of the appeal.

Appellant is reminded that a copy of

all submissions to this court must be provided to opposing counsel; all submissions must include a statement that appellant has done so. Fed. R. App. P. 25(b) and (d).

A copy of appellant's motion shall be provided to the appellee along with this order.

For the court:

CATHY A. CATTERSON
Clerk of the Court

Mario Giscome
Deputy Clerk
Ninth Cir. R. 27-7/Appendix A, General Orders for the United States Court of Appeals

pro 10.3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
----ooOoo----

JAMES EARL CONERLY, No. Civ. S-90-1106 WBS/JFM

Plaintiff,

MEMORANDUM AND ORDER

v.

MARVIN T. RUNYON, JR., POSTMASTER GENERAL OF THE UNITED STATES, et al.

Defendants.

----ooOoo----

On June 17, 1994, plaintiff Conerly filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. On June 28, 1994, this court granted Conerly's motion to proceed on appeal in *forma pauperis*. Conerly now asks the court to direct the Administrative Office of the U.S. Courts to pay the court reporter to produce transcripts of proceedings in this court

for his use on appeal.

A party appealing in *forma pauperis* may be furnished transcripts at government expense "if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question)." 28 U.S.C. Section 753(f); Henderson v. United States, 734 F.2d 483, 484 (9th Cir. 1984). In addition to determining whether the appeal presents a substantial question, the court must decide whether the transcripts are necessary to decide the issues on appeal. See McKinney v. Anderson, 924 F.2d 1500, 1511-12 (9th Cir. 1991); McCarthy v. Bronson, 906 F.2d 835, 841 (2d Cir. 1990); Harvey v. Andrist, 754 F.2d 569, 571 (5th Cir. 1985).

Transcripts are not necessary in

this case. Conerly is appealing from orders dismissing certain claims and granting summary judgment on others. The court's reasons for granting defendants" motion to dismiss and for summary judgment are fully set forth in written orders of March 1, 1994 and June 1, 1994. The only proceedings transcribed by the court reporter were oral arguments presented during the court's civil law and motion calendar. The court did not issue any rulings or indicate the basis for its rulings on the record during those proceedings, and no evidence was presented on the record.

Courts "must be rigorous" in their consideration of motions such as this "to ensure that the treasury is not unduly imposed on." Walker v. People Express Airlines, Inc., 886 F.2d 598, 601 (3d

Cir. 1989). Because the production of transcripts at the public expense would not materially aid either Conerly or the Court of appeals, IT IS ORDERED that the motion be, and the same is, hereby DENIED.

DATED: July 27, 1994

WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
----ooOoo----

JAMES EARL CONERLY, No.MISC. S-90-1106 WBS

Plaintiff,

O R D E R

v.

MARVIN T. RUNYON, POSTMASTER GENERAL OF THE UNITED STATES,

Defendants.

----ooOoo----

This court, after examining plaintiff's affidavit, hereby grants plaintiff's motion to proceed with this action in forma pauperis pursuant to 28 U.S.C. Section 1915(a). There is no evidence that plaintiff's appeal is taken in bad faith. Plaintiff should note that the determination that plaintiff may proceed in forma pauperis does not address the merits of plaintiff's appeal.

DATED: June 23, 1994

WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

**APPENDIX J**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
----ooOoo----

JAMES EARL CONERLY, No. CIV. S-90-1106 WBS/JFM

Plaintiff,

O R D E R

v.

MARVIN T. RUNYON, JR., POSTMASTER GENERAL OF THE UNITED STATES,

Defendant.

----ooOoo----

Construing the "Substitution of attorneys" as a request to withdraw pursuant Local Rule 182, the request is granted, and James E. Conerly, in propria persona, is substituted for McDonough, Holland & Allen as counsel for plaintiff.

DATED: June 10, 1994

WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

**APPENDIX K**

IT IS THEREFORE ORDERED that defendant's motion for summary judgment on plaintiff's Title VII claims be, and the same is, hereby GRANTED.

DATED: June 1, 1994

_____

WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

**APPENDIX L**

IT IS THEREFORE ORDERED that defendant's motion to dismiss plaintiff's claim for failure to state a claims under Title VII be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that defendants' motion to dismiss any claims against the United States arising under 42 U.S.C. Sections 1981 or 1985 be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment as to plaintiff's 42 U.S.C. Sections 1881 and 1985 against the individual defendants be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment as to plaintiff's EEO claim be, and the same is hereby, DENIED.

DATED: February 25, 1994

APPENDIX M

WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES E. CONERLY,

Plaintiff

v. CIV. NO. S-90-1106-WBS/JFM

ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES,

Defendant.
_____/

JAMES E. CONERLY,

Plaintiff,

v. CIV. NO. S-92-1613-LKK/JFM

MARVINT. RUNYON, JR.
Postmaster General, United States Postal Service, RELATED CASE ORDER

Defendant.
_____/

Examination of the above-entitled actions reveals that both actions are related within the meaning of Local Rule 123(a) (E.D. Cal. 1984). The actions involve the same parties, and are based on the same or similar claims, the same property, transaction or event, similar

questions of fact and the same question of law. Accordingly, the assignment of the matters to the same judge is likely to effect a substantial saving of judicial effort and is also likely to be convenient for the parties.

The parties should be aware that relating the cases under Local Rule 123 merely has the result that both actions are assigned to the same judge and magistrate judge; no consolidation of the action is effected. Under the regular practice of this court, related cases are generally assigned to the judge and magistrate judge to whom the first filed action was assigned.

IT IS THEREFORE ORDERED that the action denominated CIV. NO. S-92-1631-LKK/JFM be, and the same hereby is, reassigned to Judge William B. Shubb for

all further proceedings, and any dates currently set in this reassigned case only are hereby VACATED. The parties are referred to the attached Order Setting Status (Pretrial Scheduling) Conference. Henceforth, the caption on documents filed in the reassigned case shall be shown as CIV. NO. S-92-1631-WBS/JFM.

IT IS FURTHER ORDERED that the Clerk of the Court make appropriate adjustment in the assignment of civil cases to compensate for this reassignment.

IT IS SO ORDERED.

DATED: January 5, 1993

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES
DISTRICT COURT

conducted.[4]

Because the court does not find that an analysis of the relevant factors weighs against allowing plaintiff leave to amend, the second amended complaint may be filed.[5]

IT IS THEREFORE ORDERED that plaintiff's motion for leave to file a second amended complaint be, and the same, is hereby GRANTED.

DATED: November 23, 1992

WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

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[4] Pursuant to the August 24, 1992 Status Order, a date for discovery cut-off has not been determined.

[5] The court reminds the parties that this is a motion to amend the pleadings, not a motion to dismiss claims or parties, and was analyzed under the liberal standards for allowing amendment. If at a later date the court entertains a motion to dismiss or a motion for summary judgment, the court will utilize the stricter standards appropriate for those motions.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CIV-S-92 1631 LKK
JFM

JAMES E. CONERLY,

Plaintiff,

v. NO. MISC. S-92 240
LKK

MARVINT. RUNYON, JR.
Postmaster General, United States
Postal Service, O R D E R

Defendant.

_____/

On September 10, 1992, plaintiff petitioned the court for an order allowing him to proceed with this lawsuit in forma pauperis. This court, after examining plaintiff's affidavit, hereby grants plaintiff's motion to proceed with his action in forma pauperis pursuant to 28 U.S.C. Section 1915(a). Based on this determination, the United States Marshal is directed to issue and serve all process without prepayment of

**APPENDIX P**

costs not later than sixty (60) days from the effective date of this order.

Plaintiff should note that the determination that he may proceed in forma pauperis does not complete the threshold inquiry required of the district court. The court is also directed pursuant to 28 U.S.C. Section 1915(d) to determine that the action is of legal substance and, therefore, not frivolous or malicious. As the record in this action now stands, however, this determination cannot be made. The court therefore reserves the action until the record is sufficiently developed to support the directed inquiry.

The court also notes that in his form complaint attached to the application, plaintiff seeks appointment of legal counsel pursuant to 42 U.S.C.

Section 2000e-(f)(1)(B). Although a formal motion seeking appointment of counsel is not presently before the court, the court notes that any further application to appoint legal counsel must comply with those criteria set forth in Bradshaw v. Zoological Society of San Diego, 662 F.2d 1301 (9th Cir. 1981). In Bradshaw, the Ninth Circuit identified three factors which the court must consider in ruling on a motion for appointment of counsel: (1) the indigency of the plaintiff, (2) the efforts made by the plaintiff to retain counsel for himself, and (3) the merits of the plaintiff's lawsuit. Accordingly, plaintiff is cautioned to conform his a application with the Bradshaw requirements.

IT IS SO ORDERED.

DATED: October 1, 1992.

_____

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT
COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
----ooOoo----

JAMES EARL CONERLY, No. CIV. S-90-1106 WBS/JFM

Plaintiff,

O R D E R

v.

UNITED STATES POSTAL SERVICE, et al.,

Defendants.

----ooOoo----

Pursuant to this court's Order of March 9, 1992, a Status Conference was held in this matter on April 6, 1992. william Lichtig of McDonough, Holland & Allen appeared, and is hereby appointed to represent plaintiff in this matter; and assistant United States Attorney Michael A. Hirst appeared on behalf of defendants.

This case is ordered set for further Status Conference at 11:00 a.m. on august 24, 1992. In the interim, upon

application of counsel, the court will consider reopening discovery either upon limited or unlimited terms, and will further consider permitting amendments to the pleadings upon such terms as may appear justified.

DATED: April 6, 1992

WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
----ooOoo----

JAMES EARL CONERLY, No. CIV. S-90-1106 WBS/JFM

Plaintiff,

ORDER

v.

UNITED STATES POSTAL SERVICE, ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES,

Defendants.
----ooOoo----

Plaintiff filed this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5, alleging discrimination on the bases of race, religion, handicap and reprisal in the handling of his return to work at the Sacramento Post Office in the spring of 1989.[1] The action is based on the allegations of discriminatory conduct throughout the reinstatement process.[2]

The court previously denied

plaintiff's motion for appointment of counsel by Order dated January 15, 1991. The three relevant factors which the court considered in resolving the request for appointment of counsel were: (1) the plaintiff's financial resources; (2) the efforts made by plaintiff to secure counsel; and (3) whether plaintiff's claim has merit. Bradshaw v. Zoological Society of San Diego, 662 F.2d 1301, 1318 (9th Cir. 1981). In the Order, the court found that the first two criteria had been met, but that plaintiff had failed to demonstrate to the satisfaction of the court that there was any merit to his claim. Upon reconsideration, the court finds, without passing judgment on the

---

[1] The handicap claim must be brought pursuant to Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. Section 791. Johnston v. Horne, 875 F.2d 1415, 1421 (9th Cir. 1989)

[2] The court construes plaintiff's complaint as not to include claims of discrimination relating to discriminary action taken by the Postal Service in 1987 which were the basis of an earlier case (Civ. S. 90-0920). That complaint was dismissed on November 7, 1990.

likelihood of plaintiff prevailing in this action, that plaintiff has demonstrated sufficient merit to his claim to justify appointment of counsel.

IT IS THEREFORE ORDERED that plaintiff's motion for appointment of counsel be, and the same is, hereby GRANTED.

IT IS FURTHER ORDERED that the Clerk of Court secure an attorney who has volunteered to serve on the Title VII attorney panel to serve as counsel for plaintiff.

IT IS FURTHER ORDERED that all pending motions be taken off calendar, subject to being reset upon notice by any

party.

IT IS FURTHER ORDERED that the final Pretrial Conference set for April 6, 1992, at 1:30 p.m. be vacated and a further Status Conference be set for that time.

DATED: March 9, 1992

WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
----ooOoo----

JAMES EARL CONERLY, No. CIV. S-90-1106 WBS/JFM

Plaintiff,

ORDER

v.

UNITED STATES POSTAL SERVICE, ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES,

Defendants.

_____/

This matter is before the court on defendants' motion to dismiss, or, in the alternative, for summary judgment. The matter was heard and submitted on March 11, 1991.

THE CASE

Plaintiff has filed a civil rights action pursuant to Title VII of the Civil Rights Act, 42 U.S.C. Section 2000e-5. Plaintiff alleges job discrimination on the basis of race, religion, handicap and reprisal by the United States Postal

Service (Postal Service).[1] Plaintiff bases this action primarily on the Postal Service's failure to restore him to his former position which the Postal Service was obligated to do pursuant to a settlement agreement discussed in more detail below.[2] Plaintiff also contends that he was subjected to discriminatory conduct throughout the reinstatement process. The Postal Service dismissed plaintiff's Equal Employment Opportunity (EEO) complaint by opinion dated May 15, 1990 pursuant to 29 C.F.R. Sections 1613.405(a) and (b), because the Merit System Protection Board (MSPB) had adjudicated some of the issues raised by plaintiff in his EEO complaint.

---

[1] The handicap claim must be brought pursuant to Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. Section 791. Johnston v. Horne, 875 F.2d 1415, 1421 (9th Cir. 1989).

[2] The court construes plaintiff's complaint so as not to include claims of discrimination relating to disciplinary action taken by the Postal Service in 1987 which were raised in an earlier case (No. 90-0920). The court dismissed that complaint on November 7, 1990.

A. The MSPB Proceedings

The Postal Service terminated plaintiff's employment as a manual distribution clerk assigned to Tour II on april 4, 1988. Plaintiff challenged his dismissal with the MSPB on the basis of race, religion, handicap and reprisal discrimination. On August 1, 1988, the parties entered into a settlement agreement and the MSPB maintained jurisdiction over the matter to interpret and enforce the agreement. The settlement agreement is attached as Exhibit 2 to the declaration of Robert G. Funge. According to the agreement, plaintiff was to receive workers'

compensation until his health returned and then be "restored to duty" except that plaintiff would not be "returned to a position under Nick Gomez's supervision." The agreement provided that it was "a full and final resolution of all matter[s] described above. . . ."

Plaintiff filed a compliance appeal on May 10, 1989 to the MSPB alleging that the Postal Service was in violation of settlement agreement in two respects: unreasonable delay in job restoration and assignment to Tour I instead of Tour II. Ultimately, the MSPB found that Postal Service had delayed unreasonably and ordered back pay with interest but held that plaintiff's restoration to Tour I constituted job restoration in accordance with the settlement agreement.

Finally, after additional compliance

appeals, the MSPB dismissed plaintiff's compliance appeal on July 23, 1990 holding that the Postal Service had complied with the terms of the settlement agreement. The final decision provided notice of the right to appeal to the United States Court of Appeals for the Federal Circuit.

B. EEO Proceedings

On May 10, 1989, the same date plaintiff filed his compliance appeal with the MSPB, plaintiff sought EEO counseling concerning his restoration as a manual distribution clerk on Tour I instead of Tour II. Plaintiff alleged that postal Service employees Mike Hopper, Robert Funge and Joyce Ong discriminated against him on the basis of race, union activities, disabilities and for purpose of reprisal for the "failure

to mandatory restore to job & failure to restore to rightful day shift bid position or equal [sic]." Plaintiff filed a formal EEO complaint on June 20, 1989. The Postal Service investigated and proceeded the complaint, and, on November 24, 1989, issued a Notice of Proposed Disposition with a finding of no discrimination. Plaintiff requested a hearing on December 14, 1989 and the Postal Service referred plaintiff's complaint to an Administrative Law Judge ("ALJ"). The ALJ returned the complaint to the agency with a recommendation that it be dismissed pursuant to the "mixed case" guidelines, 29 C.F.R. Section 1614.401.

The Postal Service dismissed plaintiff's complaint by Final Agency Decision dated May 15, 1990 pursuant to

29 C.F.R. Section 1613.405(a) which provides in part:

> **whenever an agency is presented with a mixed case complaint concerning an action that has previously been appealed by the complainant, to the MSPB, the agency shall reject the complaint (in writing) citing this subsection as the authority therefor, regardless of whether the allegations of discrimination raised in the mixed case complaint were raised in the previous appeal to the MSPB.**

Section 1613.405(b) also provides for cancellation of a mixed case complaint where it is determined that a mixed case appeal was filed. The Postal Service ruled that the complaint was a mixed case complaint and dismissed it by final agency decision dated May 5, 1990, because plaintiff sought to raise issues adjudicated before the MSPB. Plaintiff timely filed the underlying civil action.

## STANDARDS

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Poller v. Columbia Broadcast System, 368 U.S. 464, 467 (1962); Loehr v. ventura County Community College Dist., 743 F.2d 1310 1313 (9th Cir. 1984).

## DISCUSSION

When a final agency decision is based on the merits of plaintiff's discrimination claims, plaintiff is entitled to a trial de novo. Clark v. Chasen, 619 F.2d 1330, 1337 (9th Cir. 1980). When a final agency decision is based on the plaintiff's failure to

prosecute, the plaintiff is entitled to trial de novo of that issue. See id. at 1337 n.18. A final agency action dismissing a complaint pursuant to the mixed case regulations, however, need not be reviewed. As the court stated in Korman v. Baker, 686 F. Supp. 812 (N.D.Cal. 1988)

> **even if the [mixed case] regulations were properly applied at the administrative level, the governing statute precludes their application as a bar to judicial revise. Section 7702, which the regulations purport to implement, provides that "[n]othing in this section shall be construed to affect the right to trial de novo" under Title VII.**

Id, at 814 (citing 5 U.S.C. Section 7702(e)(3). The court noted that the administrative procedures under Title VII are "byzantine" and "should not be applied in such manner that they become a trap for the unwary." Id.

**The Equal Employment Opportunity**

> **Act is a remedial statute to be liberally construed in favor of the victims of discrimination. . . . The broad structure and purpose to Title VII, as established by Congress, to initiate both administrative complaints and lawsuits. Congress did not intend that such laymen, not scholled know exactly what procedural step they must next take in order to perfect their claims.**
> . . . .

Mahroom v. Hook, 563 F.2d 1369, 1375 (9th Cir. 1977), cert. denied, 436 U.S. 904

(1978) (CITATION OMITTED); see also Brown v. Continental Can Co., 765 F.2d 810, 813 (9th Cir. 1985) (quoting Zipes v. Trans

World Airlines, Inc., 455 U.S. 385 397

(1982); Love v. Pullman Co., 404 U.S.

522, 527 (1972). **The focus of the**

**court's inquiry is whether plaintiff**

**"made a good faith effort to comply with**

**administrative procedures . . . ."**

**Korman, 686 F. Supp. at 815 (citing Wade**

**v. Secretary of the Army, 796 F.2d 1369, 1376 (11th Cir. 1986)).**

**The administrative regulations are**

supported to facilitate the resolution of discrimination claims. They are not supposed to be an obstacle course which only the most astute claimants can traverse. The court finds that plaintiff made a good faith effort to comply with the administrative procedures which are indeed byzantine.

A "mixed case" arises when a discrimination claim is raised by federal employee in connection with claim of adverse action that is appealable to the MSPB. 29 C.F.R. Section 1613.401(b). An employee may appeal a mixed case to the MSPB, 29 C.F.R. Section 1613.402(b), or pursue the claim through the EEO channels by filing a complaint with the agency. 29 C.F.R. Section 1613.403. A complainant may not pursue both options. 29 C.F.R. Section 1613.403; Hays v.

Postmaster General, 868 F.2d 328, 329 (9th Cir. 1989).

While plaintiff may have been mistaken in believing that his claims of discrimination in connection with this job restoration were properly handled through the EEO process, two factors warrant a finding that plaintiff made a good faith effort to comply with the administrative procedure. First, it appears that plaintiff was never informed, pursuant to 5 C.F.R. Section 1201.157, that if he wanted to appeal a final decision of the MSPB that involved a claim of discrimination, he could only do so by filing a civil action in district court or seek review before the Equal Employment Opportunity Commission. Rather, the MSPB informed plaintiff that he had the right to appeal to the Court

of appeals for the Federal Circuit, a court that has no jurisdiction to entertain a Title VII claim. See 868 F.2d at 331, n.3. Second, it appears that no one from the Postal Service involved in the EEO process informed plaintiff, pursuant to 29 C.F.R. Section 1613.405 that he should bring his discrimination claims to the attention of the MSPB. Rather, the final agency decision provided that if plaintiff were dissatisfied with the decision, he could file a civil action in federal district court. Plaintiff thereupon filed the underlying action.

The court addresses defendants' arguments that either res judicata or the settlement agreement bars plaintiff's Title VII claim. First, Kremer v. Chemical Construction Corp., 456 U.S.

461, reh'g denied, 458 U.S. 1133 (1982) is distinguishable. There has been no prior court litigation of plaintiff's reinstatement claim. For the reasons discussed above, the court will not give the MSPB decision res judicata effect for that would constitute a trap for the unwary in violation of the Equal Employment Opportunity Act.

Second, the court cannot find, as a matter of law, that the settlement agreement bars plaintiff from raising claims of discrimination arising out of his reinstatement. The agreement merely recites that it resolves the matters "described above" which concerned plaintiff's termination and not his reinstatement.

THEREFORE IT IS ORDERED that defendants' motion for summary judgment

be, and the same is, hereby denied.

DATED: March 15, 1991

WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

APPENDIX S

IN THE UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| JAMES EARL CONERLY<br><br>Plaintiff,<br><br>UNITED STATES POSTAL SERVICE, ANTHONY M. FRANK, POSTMASTER GENERAL OF THE UNITED STATES,<br><br>Defendants. | NO. CIV.S-90-1106/DFL<br><br>ORDER |

Upon examination of the above-captioned action, the undersigned judge disqualifies himself because he participated as counsel in this action when serving in government employment. 28 U.S.C. Section 455(b)(3).

Good cause appearing therefor,

IT IS HEREBY ORDERED that the undersigned excuses himself as the judge for the above-captioned case.

IT IS FURTHER ORDERED that the Clerk

of the Court reassign this case to another judge for all further proceedings.

IT IS SO ORDERED.

DATED: 11/21/90

DAVID F. LEVI
UNITED STATES DISTRICT
JUDGE

IT IS FURTHER ORDERED that the above-captioned case is reassigned to the Honorable WILLIAM B. SHUBB.

IT IS SO ORDERED.

DATED: 11/26/90.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES
DISTRICT COURT

THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CIV.S-90-1106-DFL

ORDER OF REASSIGNMENT

The Court, having considered the recent appointment of new U.S. District Judges to the Eastern District Bench, finds the necessity for reassignment of the attached list of civil cases, and for notice to be given to the affected parties.

IT IS THEREFORE ORDERED that:

1. The attached list of cases shall be and are hereby reassigned to JUDGE DAVID F. LEVI;

2. The Clerk of Court shall give notice to the parties of this reassignment by service of this order and the "Case Status Notice Form" (copy attached);

**APPENDIX U**

3. Plaintiff shall complete the case status form, serve on opposing counsel and return to the Court within SEVEN (7) DAYS.

Dated: Nov. 13, 1990

ROBERT E. COYLE, CHIEF
U.S. DISTRICT COURT
JUDGE

90 CV 1106 Conerly Franks

**IN THE UNITED STATED DISTRICT COURT**

**FOR THE EASTERN DISTRICT OF CALIFORNIA**

| | | |
|---|---|---|
| **JAMES EARL CONERLY** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | **MISC. NO. 90** |
| **UNITED STATES POSTAL** | ) | **124 MLS** |
| **SERVICE, ANTHONY M.** | ) | |
| **FRANK, POSTMASTER** | ) | |
| **GENERAL OF THE UNITED** | ) | |
| **STATES,** | ) | |
| | ) | |
| **Defendants.** | ) | |
| | ) | |

O R D E R

Plaintiff seeks leave to proceed in *forma pauperis* with an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq.

After reviewing the affidavit filed in support of his request to proceed in *forma pauperis*, the court has concluded that plaintiff should be granted leave to proceed without prepayment of costs. See 28 U.S.C. Section 1915(a).

**APPENDIX V**

Plaintiff should note that the determination that he may proceed in *forma pauperis* does not complete the threshold inquiry required of the district court. The court is also directed by 28 U.S.C. Section 1915(d) to determine that the action is of legal substance and therefore not frivolous or malicious. As the record in this action now stands, however this determination cannot be made as yet. The court retains the case until the record is sufficiently developed to support the directed inquiry.

IT IS THEREFORE ORDERED that plaintiff's request for leave to proceed in *forma pauperis* with this action is granted.

IT IS FURTHER ORDERED that the United States Marshal is directed to

serve the summons and complaint upon the defendant without prepayment of costs within sixty (60) days of the date of this order. If the United States Marshall is unable to effectuate service on the defendant within sixty (60) days, he is directed to report that fact and the reason therefor to the undersigned.

DATED: August 27, 1990

UNITED STATES
DISTRICT JUDGE

Section 701 **Congressional declaration purpose**

The purpose of this chapter is to develop and implement, through research, training services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living.

(Pub.L. 93-112, Section 2, Sept. 26, 1973, 87 Stat/ 357; Pub.L. 95-602, Title 1, Section 122(a)(1), Nov. 6, 1978, 92 Stat. 2984.)

**29 Section 791 Employment of handicapped individuals**

**(a) Interagency Committee on Handicapped Employees; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions**

There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designers whose positions are Executive Level IV or higher): the Chairman of the Office of Personnel Management, the Administrator of Veterans" Affairs, and the Secretaries of Labor and Education and Health and Human Services. The Secretary of Education and the Chairman of the Office of Personnel Management shall serve as co-chairman of the Committee (1) to provide a focus for Federal and other employment of handicapped individuals, and to review, on a periodic basis in cooperation with the Office of Personnel Management, the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency, and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with Office of Personnel Management to assist the Office to carry out its responsibilities under Committee shall periodically make to the Office of Personnel Management such recommendations for legislative and administrative changes as it deems necessary or desirable. The Office of Personnel

Management shall timely transmit to the appropriate committees of Congress any such recommendations.

**(b) Federal agencies; affirmative action program plans**

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Office of Personnel Management and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Office, if the Office determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

**(c) State agencies; rehabilitated individuals, employment**

The Office of Personnel Management, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for handicapped individuals, including the

promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

**(d) Report to Congressional committees**

The Office of Personnel Management, after consultation with Committee, shall, on June 30, 2994, and at the end of each subsequent fiscal year, make a completion report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of handicapped individuals by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the activities of the Office of Personnel Management under subsections (b) and (c) of this section.

**(e) Federal work experience without pay; non-Federal status**

An individual who, as a part of his individualized written rehabilitation program under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee or to be subject to the provisions of law relating to Federal employment including those relating to hours of work, rates on compensation, leave, unemployment compensation and Federal employee benefits.

**(f) Federal agency cooperation; special consideration for positions on President's Committee on Employment of Handicapped**

**(1)** The Secretary of Labor and the Secretary of Education are authorized and directed to cooperate with President's Committee on Employment of the Handicapped in carrying out its functions.

**(2)** In selecting personnel to fill all positions on the President's Committee on Employment of the Handicapped, special consideration shall be given to qualified handicapped individuals.

(Pub.L. 93-112, Title V, Section 501, Sept. 26, 1993, 87 Stat. 390; Pub.L. 98-221, Title I, Section 104(b)(3), Feb. 22, 1984, 98 Stat. 18.)

No._____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1998**

**JAMES E. CONERLY - PETITIONER**
**VS.**
**MARVIN T. BUNYON, JR., POSTMASTER GENERAL OF THE UNITED STATES; UNITED STATES OF AMERICA; UNITED STATES POSTAL SERVICE; MICHAEL HOPPER; JOYCE ONG; ROBERT FUNGE;- RESPONDENTS**

---

**PROOF OF SERVICE**

I, James Earl Conerly, do swear or declare that on this date, May 29, 1998, pursuant to Supreme Court Rule 29.3 and 29.4 (a), I have served the attached PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that a party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General of the United States,
Room 5614, Department of Justice
950 Pennsylvania Ave, N.W.
Washington, DC 20530-0001

Debora G. Luther
Assistant U.S. Attorney
555 Capitol Mall, Suite 1550
Sacramento, California 95814

James E. Conerly/Affiant

Solicitor General of the
United States, Room 5614
Department of Justice
Pennsylvania Ave, N.W.
Washington, DC 20530-0001

950

Debora G.Luther
Assistant U.S. Attorney
555 Capitol Mall,
Suite 1550
Sacramento, California
95814

_____
James E. Conerly
Affiant

**Subscribed and Sworn to Before Me**
**This ___ day of May 1998.**

_____
**Notary Public in and for said**
**County and State**

Solicitor General of the
United States, Room 5614
Department of Justice
Pennsylvania Ave, N.W.
Washington, DC 20530-0001

950

Debora G.Luther
Assistant U.S. Attorney
555 Capitol Mall,
Suite 1550
Sacramento, California
95814

James E. Conerly
Affiant

**Subscribed and Sworn to Before Me**
**This 27 day of May 1998.**

**Notary Public in and for said**
**County and State**